

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHRISTINE WOLF,

Plaintiff and Appellant,

v.

LORING WARD INTERNATIONAL,  
LTD., et al.,

Defendants and Respondents.

B275678

(Los Angeles County  
Super. Ct. No. BC445310)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Holly A. Kendig, Judge. Affirmed.

Pine Pine Freeman Tillett, Norman Pine and Scott Tillett;  
Parker Mills and David B. Parker for Plaintiff and Appellant.

Kinsella Weitzman Iser Kump & Aldisert, Dale F. Kinsella,  
Patricia A. Millett and Kristen L. Spanier; Kendall Brill & Kelly,  
Richard B. Kendall and Nicholas F. Daum for Defendants and  
Respondents.

---

## INTRODUCTION

In this appeal, appellant Christine Wolf (Christine) challenges the ruling by the trial court that the valuations and other breaches of fiduciary duty that she claims took place during the mediation of her divorce action were privileged under the mediation privilege of Evidence Code Section 1119.<sup>1</sup>

The trial court held that the mediator in this case, defendant Martin Weinberg (Weinberg), was entitled to the protections of the mediation privilege and that the documents sought by plaintiff were properly withheld from production by defendants. In denying Christine's motion to compel, the court answered two questions: What is the proper definition of the term "neutral person" as used in section 1115? And, whether, under even Christine's definition, was there any evidence to support her claim that Weinberg was not a neutral person entitled to mediation confidentiality? Christine challenges the court's statutory interpretation as a matter of law and argues that certain evidentiary and procedural errors constitute an abuse of discretion compelling reversal.

Christine also appeals the trial court's grants of summary judgment in favor of the defendants. She argues that since the court erroneously concluded that the Weinberg proceeding was a protected mediation, it also erred in attaching to that process the absolute quasi-judicial immunity ordinarily extended to neutral third parties for their conduct in performing dispute resolution processes. (*Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 858–859.) Christine also challenges the trial court's dismissal of

---

<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

the case in a separate motion for summary judgment because of the protected nature of the mediation. Given that Christine could not establish liability and defendants would have been unable to defend themselves in the action without using the documents withheld because of the mediation privilege, the court concluded that the case could not go forward. (*Solin v. O'Melveny & Meyers* (2001) 89 Cal.App.4th 451, 467.) Christine also challenges a number of evidentiary rulings made by the court in the determination of those motions and asserts that they constitute an abuse of discretion so as to require reversal.

We find no trial court error and thus we affirm.

### **BACKGROUND FACTS**

In August 2003, Christine entered into a marital settlement agreement (MSA) with her then-husband, Richard “Dick” Wolf (Dick) to dissolve their marriage. The parties’ agreement was the result of a voluntary mediation between Christine and Dick that spanned several months. That mediation was facilitated by defendant Weinberg. Christine initially contacted Weinberg to ask him to act as the mediator; Dick later agreed to that proposal.

Shortly after signing the MSA and dissolving her marriage, Christine read about a billion-dollar business deal that Dick and NBC Universal struck regarding profit participation in the broadcast of the television series *Law and Order* and its progeny. Christine filed an action in Santa Barbara Superior Court to set the MSA aside, claiming that Dick had concealed assets. In 2006, this Court found that the Santa Barbara Superior Court had correctly ruled that there was no concealment and that there

was, therefore, no basis to set aside the MSA.<sup>2</sup> (*Wolf v. Wolf* (Jan. 25, 2006, B177351) [nonpub. opn.] )

Christine thereafter turned to the mediator, Weinberg, and his former employer Assante Corporation, Assante Corporation's successor, Loring Ward International Limited (LWIL) and the Wolf family's former business manager, Robert Philpott<sup>3</sup> and Philpott's then-employer SNCB002, Inc. (formerly Assante Business Management) (collectively, defendants) for redress. Christine filed an action in the United States District Court, Central District of California, entitled *Wolf v. Loring Ward International, Ltd., et al.*, against the same parties named as defendants in this action. In September 2007, defendant Loring Ward International, Inc. (LWII) was dismissed from the federal action for lack of jurisdiction. In April 2008, the entire federal action was dismissed for lack of subject matter jurisdiction.<sup>4</sup> On March 30, 2010, the Ninth Circuit reversed the district court's

---

<sup>2</sup> As part of that appeal, Christine characterized the process by which the MSA was secured as a mediation. And, in its 2006 opinion, this Court described the process as “[h]oping to avoid litigation, the parties agreed to reach a settlement through a mediator, Martin Weinberg.”

<sup>3</sup> During the course of the litigation, Robert Philpott died. His widow, Margaret A. Philpott, as Trustee of the Philpott Family Trust, was substituted in his stead.

<sup>4</sup> In addition to filing an appeal of that decision, Christine filed a complaint in the trial court against the same defendants, which was thereafter removed and assigned to the federal judge who had dismissed the same action. Rather than pursue two actions, Christine elected to dismiss without prejudice the 2008 superior court action.

ruling. But, shortly after remand to the district court, in August 2010, the federal court dismissed the federal case sua sponte for a lack of diversity jurisdiction. Rather than continue in the federal forum, Christine elected to file her action in the Los Angeles Superior Court.

In this complaint, filed in September 2010, Christine alleged that, before and during the mediation, defendants negligently or purposefully concealed substantial assets of the community estate. Specifically, Christine alleged that the defendants withheld critical information regarding the value of the community's substantial assets during the course of the mediation and, but for that omission, she would not have agreed to the MSA.

Given that the gravamen of Christine's lawsuit was a claim of alleged misconduct by a mediator during a mediation, an obvious question was whether the conduct of the parties during the creation and course of that dispute resolution process was protected under section 1119's mediation privilege. That section renders inadmissible statements, writings or communications "prepared for the purpose of, in the course of, or pursuant to, a mediation." Christine's counsel acknowledged that the "logical sequence" was for the court to decide the mediation privilege issue and whether it pertained, and then a summary judgment motion could be brought "in connection with the ability or inability to present certain evidence."

After a number of hearings and discussions with regard to the appropriate procedural mechanism by which this issue could be decided, the parties presented the issue as a motion to compel production of certain documents requested from Weinberg and withheld by defendants on the ground of mediation privilege.

**A. Motion to Compel and the Mediation Privilege**

As noted by the trial court in its decision of June 24, 2015, the parties agreed that there was no need for the court to review the privilege log, but rather what was required was a judicial determination as to whether Weinberg was a neutral person within the meaning of section 1115, subdivision (b), and whether Weinberg facilitated a property division negotiation that could be characterized as a “mediation” within the meaning of section 1115, subdivision (a). If there was no privileged process in this case, then the mediation confidentiality claimed by the defendants would not be allowed.

Christine asserted that the process used in her case did not qualify as a mediation because the statutes governing the mediation privilege define the mediator as a neutral person and a mediation as a process involving a neutral person. And, she further argued that in order to qualify as a “neutral person,” the mediator must be free from a preexisting relationship with a party or an interest in the outcome of the dispute that would tend to cause bias. Christine asserted that Weinberg had a preexisting relationship with her husband Dick and Weinberg had an interest in obtaining business from Dick after the marital dissolution. Thus, Weinberg was not a neutral person and the process that he facilitated was not a mediation.

The court addressed Christine’s legal contention that the mediation provisions of the Evidence Code implicitly required an absence of bias in the neutral person who facilitated the process. First, she noted that, as a general principle, the mediation privilege was not only zealously guarded, but essential to the preservation of confidentiality in the mediation process. Citing *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 133, the trial

court observed that “the judiciary has no authority to craft its own exceptions to the mediation confidentiality statutes, ‘even where the equities appeared to favor them.’” And, citing *Amis v. Greenberg Traurig LLP* (2015) 235 Cal.App.4th 331, 338, the court observed that the mediation confidentiality statutes are to be broadly applied, “even in situations where justice seems to call for a different result.”

In light of the important purposes of these statutes and the case law precluding the imposition of judicially imposed exceptions to their protection, the trial court then considered the statutory language, the case law and the California Law Revision Commission’s comments regarding section 1115 et seq. The court concluded that the term “neutral person” focused not on a person’s state of mind or subjective opinions regarding the parties’ positions, but instead on a role within the process of negotiation by both parties. For example, a “neutral person” does not have the authority to resolve or decide the dispute and should not, therefore, have any function for the adjudicating tribunal. (See *Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1140; see also *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 270.)

The court also found that the legislative history similarly supports defining the term “neutral” in light of the person’s role. The 1996 amendments to the then-existing mediation statutes did not mention, nor did they include, any intent to impose standards for bias, conflict of interest or disclosure on mediators. Nor did the Law Revision Commission’s report underlying that legislative effort mention any intent to limit the definition of a mediator to exclude those who had any form of prior relationship with a party to a mediation. In fact, the Law Revision

Commission observed that, “the definition [of mediator] focuses on a person’s role, not the person’s title.” For example, an “ombudsperson” could act as a neutral person, even though that person could well have a prior relationship with one or both parties to the mediation.

Also relevant to the trial court’s statutory analysis was the fact that prior to passing section 1115, the Legislature considered and rejected a provision incorporating a disclosure, conduct and bias requirement in the mediation statute. The bill’s author rejected the imposition of those requirements because, among other issues, it ignored the wide variety of mediators, including “peer (student),” or “community based” mediators, employed in a number of different settings. In such instances, the peer or community mediator would be likely to have a prior relationship with a party. The court concluded that the Legislature’s express rejection of the bias/disclosure proposal “reveals, at a minimum, an intention that mediation confidentiality apply to a wide range of circumstances, including circumstances in which the mediator presumably could have had a preexisting relationship with one or more parties.”

Supporting further this reading of the statutory language and history was the observation that there is nothing in the entire statutory scheme governing the mediation privilege in sections 1115–1128 that requires a mediator to disclose conflicts of interest, or that conditions the mediation privilege on the disclosure of such conflicts or on their absence. And, although mediators in court-connected mediation programs must disclose conflicts under California Rules of Court, rule 3.855, this requirement has not been imposed as a condition to mediation privilege under the Evidence Code.



The trial court also considered and rejected Christine's argument based on the comment to section 1115 that disqualifies "[a]n attorney or other representative of a party" from acting as a neutral person. (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (2004 ed.) foll § 1115, p. 387. ) The disqualification of a person acting on behalf of a party (such as an attorney or nonattorney representative) does not support plaintiff's claim that a preexisting relationship is enough to disqualify someone as a neutral person. Rather, the Law Revision Commission wrote its comment about a "representative of a party" to cover the situation in which lay representatives could appear in administrative proceedings. That comment cannot be fairly read to disqualify a neutral person based only on a preexisting relationship with one of the parties. (See also Cal. Rules of Court, rule 3.894(a)(1) [using the term "representative" to mean the person authorized by a non-natural person to settle the dispute].)

The trial court also considered the evidence accepting, *arguendo*, Christine's contention that the law required a neutral person to be impartial. Applying the undisputed facts to this definition, the judge found that Weinberg acted as a neutral person and the process he facilitated was a mediation for which the protections of mediation confidentiality would pertain. The court examined the record "for bias on the part of the mediator" and found that there no evidence that Weinberg had a prior, individual relationship with Dick so as to support an inference of bias. Rather, the only contact between Dick and Weinberg before the meeting was a single chance meeting while the Wolfs were still married. And, there was no evidence in the record to support Christine's speculation that Weinberg favored Dick based on the

prospect of future business. Ironically, it was Christine, not Dick, who had future business dealings with Weinberg after the mediation. That Weinberg accepted an expensive watch from Dick as a gift after the conclusion of the mediation was not a sufficient factual basis to support a reasonable inference that Weinberg was not impartial during the mediation.

Nor was there evidence to support Christine's claim that Philpott and the Assante entities acted as mediators during this negotiation. Even considering the couple's prior relationship with Philpott as their business manager, there was no evidence adduced that Philpott participated in the mediation as a mediator. Instead, Christine's own deposition testimony contradicted this contention. The evidence established only that Philpott provided the couple's financial documents to the mediator – a fact that Weinberg disclosed to Christine at the very outset of the mediation and for which there was no objection. Nor was Christine's evidence from the Assante organization sufficient to support her claim that they were somehow mediators. Christine approached Weinberg to be the mediator and Weinberg agreed only if Dick consented. After Dick consented, Weinberg acted as the facilitator. Thus, there was no evidence adduced that the Assante organization participated in this role.

Finding that the defendants had carried their burden of establishing that Weinberg met the definition of "neutral person" and that the mediation privilege had been properly asserted, the court denied Christine's motion to compel.<sup>5</sup>

---

<sup>5</sup> Christine filed a writ of mandate seeking an immediate appeal of the trial court's ruling. This division denied that writ on August 21, 2015. A petition for review was denied on October 14, 2015.

## **B. Motions for Summary Judgment**

Defendants filed two motions for summary judgment. One motion, filed by all defendants, argued that because evidence protected by the mediation privilege was inadmissible, Christine could not prove her claims and the defendants were unfairly precluded from defending themselves in this litigation. That motion also argued that Christine's claims were barred by the litigation privilege. The second motion, filed by defendants Weinberg, Assante Corp. and LWIL, argued that because Weinberg was a mediator, and all of Christine's claims arose under or were related to his role as mediator, he and his employers were entitled to absolute immunity from suit under *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 860.

On April 1, 2016, the trial court granted summary judgment on the "immunity" motion in favor of Weinberg, Assante Corp. and LWIL, finding that the undisputed facts established that Weinberg was acting as a mediator. On April 6, 2016, the trial court granted the other summary judgment motion. Because without mediation evidence Christine could not prove her case and the defendants could not adequately defend, the trial court granted summary judgment. Alternatively, materials prepared by the defendants for the mediation were protected by the litigation privilege. As part of those motions, the trial court issued extensive rulings on both sides' evidentiary objections.

Christine thereafter filed this appeal.

## **DISCUSSION**

### **A. Standard of Review**

At the heart of this appeal is the question of whether the trial court erred with regard to its legal ruling on the motion to

compel the production of documents for which defendants had asserted the mediation privilege. Christine argues that the trial court erred as a matter of law in defining the statutory language “neutral person” as she did and in concluding, based on the undisputed facts, that Weinberg was a mediator and the process that he facilitated was a mediation. Christine argues that the defendants did not meet their burden of establishing the existence of the mediation privilege. “ ‘ “Where there is a basis for the trial court’s ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.] The trial court’s determination will be set aside only when it has been demonstrated that there was ‘no legal justification’ for the order granting or denying the discovery in question. [Citations.]” [Citation.] We defer to the court’s factual findings concerning privilege if they are supported by substantial evidence.’ [Citation.] Where the facts are undisputed, the privilege claim is one of law, which is reviewed de novo.” (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1515.)

As a corollary to the court’s ruling on mediation privilege, Christine challenges the court’s determination on summary judgment that defendants Weinberg, Assante Corp. and LWIL were entitled to the quasi-judicial immunity granted to neutrals for their conduct in performing dispute resolution services.<sup>6</sup> (See *Howard v. Drapkin, supra*, 222 Cal.App.3d at pp. 852–853.)

---

<sup>6</sup> Weinberg acted as a mediator facilitating the discussions. Christine’s claims against Assante Corp. and LWIL were vicarious claims, entirely dependent upon the alleged liability of Weinberg. If Weinberg is entitled to absolute immunity, so too are his affiliated corporate entities. (See *Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal. App.4th 1412, 1423.)

Christine argues that “[d]efendants’ bias precludes [the] application of quasi-judicial immunity.” The trial court’s legal conclusion regarding the application of quasi-judicial immunity based on the same record is also reviewed by this Court de novo.

Similarly, Christine challenges the trial court’s grant of summary judgment to all of the defendants based on the litigation privilege of Civil Code section 47, subdivision (b) and the fact that, in the absence of the mediation-privilege protected documents (such as the term sheet), Christine could not demonstrate liability on her main theory of the case. Nor could defendants mount a defense. Christine argues that the trial judge ignored triable factual issues regarding how Christine was induced to enter into the mediation, thus rendering the mediation a “sham,” and not entitled to the protections of the privilege or the exclusion of mediation-related evidence. The trial court’s legal conclusion regarding the application of the litigation privilege, or the effect of the mediation privilege on the capacity of the parties to assert and/or defend this action is also reviewed by this Court de novo.

Overarching her legal challenges, Christine complains that the trial court impermissibly excluded certain evidence and committed evidentiary errors. Specifically, Christine complains that certain evidence submitted as part of the motion to compel was not read or considered by the court. She also claims error with regard to a number of the trial court’s evidentiary rulings made on the motions for summary judgment. These issues are subject to an abuse of discretion standard of review on appeal.<sup>7</sup>

---

<sup>7</sup> Unlike in *Reid v. Google* (2010) 50 Cal.4th 512, 535, the court did not fail to rule on the parties’ numerous objections to evidence submitted as part of the motions for summary

(*People v. Waidla* (2000) 22 Cal.4th 690, 717–718.) Moreover, an error on an evidentiary ruling “does not require reversal unless the appellant shows the ruling was prejudicial – i.e., that it is reasonably probable the appellant would have obtained a more favorable result absent the error.” (*Coastside Fishing Club v. California Fish & Game Com.* (2013) 215 Cal.App.4th 397, 428.)

## **B. Analysis**

### **1. The Court Did Not Abuse Its Discretion in Ruling on the Evidence.**

Before considering the issues of law, it is necessary to consider the numerous procedural objections asserted by Christine on appeal. In fact, Christine objects that the entire judicial process below was so infected with prejudicial error and abuse of discretion as to require summary reversal of the case without reaching the legal issues presented.

#### *a. Consideration of the Entire Record*

Christine’s first claim on appeal is that the trial court “failed to consider most of the evidence Christine filed in support of the [motion to compel].” Citing to the court’s incorporation of a minute order from the first of several hearings on this motion in its final ruling, Christine suggests that the trial court did not consider evidence contained in volume II of exhibits to the declaration of Paul Derby, Christine’s attorney.

A careful review of the entire record, however, refutes this claim. While the trial court issued a minute order at the end of

---

judgment. The trial court exercised ample discretion in making the rulings on the evidence as it did. Thus, the abuse of discretion standard of review should apply. (See *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122–1124 (conc. opn. of Turner, J.).)

the first day of hearings on the motion to compel that reflected that it hadn't received certain exhibits to the Derby declaration, those exhibits were fully and completely considered by the court well before the final ruling on the motion – which occurred months later and after several more hearings. For example, during the February 26, 2015 hearing, Derby referenced exhibit Z (which was in the volume Christine now claims was never considered). At that hearing, the trial court orally confirmed that it had located the declaration and exhibit Z. Later in the argument, Derby also referred to other exhibits (R, S and T) contained in this second exhibit volume. The trial court confirmed that it was considering that evidence but was not convinced that it supported the factual inferences or legal conclusions asserted by Christine. At the March 2, 2015 hearing on the motion to compel, Christine's lawyer again referenced exhibits contained in the second volume. Not only did the court display a familiarity with these documents and evidence, but it noted that her exhibit G was missing a page. The court then inserted the missing page into the court's copy of that volume of the Derby declaration.

Christine's contention that the trial judge did not review the entire record before ruling on the motion to compel is amply contradicted by the record and cannot be the basis of a claim of error. That the court's earlier minute order was not thereafter updated to reflect its careful consideration of all of this evidence is a mere clerical omission, not reversible error.

*b. Evidentiary Rulings in the Motions for Summary Judgment*

Christine asserts that the trial court's rulings on the evidence that she submitted in opposition to the motion for

summary judgment were erroneous. Specifically, she complains that sustaining defendants’ “frivolous” authenticity objections constitutes an abuse of discretion. Christine argues that the defendants’ failure to assert these objections as part of the motion to compel constitutes an “affirmative admission” as to their authenticity, thereafter barring later objections. Christine also complains that the trial court erred in excluding certain transcripts by sustaining authentication objections, even though the defendants cited several of the same documents, either in this case or in other cases. Christine also complains about the trial court’s ruling on authentication to excerpts of deposition transcripts due to their absence of a court reporter certification. According to Christine, these transcripts could be authenticated in other ways, including by circumstantial evidence.

We find no abuse of discretion with regard to these evidentiary rulings. A trial court acts well within its discretion in excluding evidence at issue. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679—680 [a mere difference of opinion does not constitute an abuse of discretion]). The unauthenticated court records submitted by Christine were properly excluded. Christine attempted to introduce documents that she described as “court records” from the (1) Wolf Dissolution Action; (2) the Federal Action; and (3) a Canadian action to which Christine was not a party, without providing certified copies of the records. Instead, Christine relied on testimony by counsel (who was not involved in the preparation or filing of the records) for authentication.<sup>8</sup> Under such

---

<sup>8</sup> Christine also objected to the authenticity of uncertified court records from the dissolution action offered by defendants in connection with the summary judgment motions. These



circumstances – each of which was noted by the trial court – the court acted well within the bounds of reason in excluding the uncertified court records. (See *People v. Skiles* (2011) 51 Cal.4th 1178, 1187–88; *Ross v. Creel Printing & Publishing Co., Inc.* (2002) 100 Cal.App.4th 736, 743.) A party must authenticate evidence to ensure that the evidence is what it purports to be. (*Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1283.) As the trial court noted, Christine’s counsel had no personal knowledge of the court records from the federal and Canadian actions and his conclusion that the documents were “true and correct copies” fell short of meeting Christine’s burden of authenticating the documents.

Nor did the defendants waive their authenticity objections by electing not to object when Christine submitted them in support of her motion to compel. Neither of the cases cited by Christine supports the claim that a party waives the right to object to that document’s authenticity at any future proceeding. Rather, both cases stand for the proposition that an objection to the admission of evidence cannot be made for the first time on appeal. (See *Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1057–58; *People v. Sims* (1993) 5 Cal.4th 405, 448.)

Nor was the trial court required to search for uncited deposition testimony (in a deposition transcript of Weinberg that was excluded) to find a basis for authenticating the documents. Christine did not reference the relevant Weinberg deposition testimony in her opposition, separate statement, or declaration of her counsel. It was not an abuse of discretion for the court to

---

objections were sustained. Defendants’ failed attempt to introduce uncertified records does not constitute a basis for Christine’s claim of error.

decline to engage in independent fact finding not otherwise brought to its attention in the briefs. And, the fact that Weinberg testified in the federal action (again in an uncited portion of an excluded transcript) that he produced documents in the Federal Action, using a Bates Stamp prefix MW, was insufficient to authenticate the document. (See *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 244 [mere fact that a document was produced in discovery is not enough to authenticate the document].) Nor was there any other circumstantial evidence that provided an assurance of authenticity. The e-mails at issue do not carry self-authenticating logos or other indicia of authenticity. Nor did the defendants act as if the documents were authentic.

Further, the trial court did not err in excluding unauthenticated deposition transcripts. Authentication of deposition transcripts is governed by Code of Civil Procedure section 273. Under that section, “[t]he report of the official reporter . . . when transcribed and certified as being a correct transcript of the testimony . . . is prima facie evidence of that testimony. (Code Civ. Proc., § 273; see also Code Civ. Proc., § 2025.540, subd. (a) [requiring a deposition officer to certify on a deposition transcript that the transcript is a true and correct copy of the testimony given].) When a party proffers photocopies of a deposition transcript, rather than certified copies or duplicate originals, “the trial court act[s] properly in excluding any testimony contained therein.” (*Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, 546.) Christine’s submission of purported photocopies of condensed versions of deposition transcripts from both this case and the Federal Action, without

court reporter certifications, were properly found wanting – as were those submitted by the defendants.<sup>9</sup>

As the trial court's evidentiary rulings were proper, they afford no basis for reversal. Moreover, even if there were an error on an evidentiary ruling, it would not support reversal unless the appellant could show prejudice, i.e., that the appellant would have obtained a more favorable result absent the error. (*Coastside Fishing Club v. California Fish & Game Com.*, *supra*, 215 Cal.App.4th at 428.) Christine fails to make this requisite showing. In this case, the authenticity issue arose only in connection with the motions for summary judgment; the motion to compel did not foreclose consideration of this evidence. And yet, the court's ruling on the motion to compel was that Weinberg acted as a mediator and the proceeding he facilitated was a mediation. It is the existence of the mediation privilege that is fatal to Christine's case on summary judgment. Accordingly, it must be concluded that the exclusion of this evidence based on newly asserted evidentiary objections in the second round of

---

<sup>9</sup> Nor did the court abuse its discretion in disallowing a last-minute proffer of exhibits by Christine's lawyer in an attempt to cure defects in the evidence. Christine's counsel had been aware of the issues raised in the motions for summary judgment since June 2014 when defendants first filed their motions for summary judgment, and had known for more than 21 months that she would need to obtain admissible evidence to oppose the motions. Given Christine's inexplicable delay in obtaining admissible evidence, the court acted well within the bounds of reason in sustaining the objections based on the materials then provided to the court. (Code Civ. Proc., § 437c, subd. (b) [evidence submitted in opposition to motions for summary judgment must be provided at least 14 days before the hearing on the motion].)

motions (even if it could be found to have been incorrect) was harmless.

2. The Court Did Not Err in Protecting the Confidentiality of the Mediation.

This was a lawsuit brought by Christine to challenge alleged misconduct by a mediator during a mediation. As a predicate to successfully challenging the mediation and the conduct of the parties during that mediation, Christine needed to pierce the confidentiality protections afforded by California law to mediators and the mediations that they oversee. It is this effort that is at the heart of the legal issues presented here.

The California Legislature and the judicial branch have broadly protected the confidentiality of information exchanged as part of a mediation. Section 1115 et seq. expressly precludes discovery of all such information. Statements, writings or communications “prepared for the purpose of, in the course of, or pursuant to, a mediation” are not subject to discovery and the disclosure of such materials “shall not be compelled.” (§ 1119.) Except in rare circumstances, “these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected.” (*Cassel, supra*, 51 Cal.4th at p. 118.)

The confidentiality protections afforded mediations are broad and extensive. For example, in *Foxgate Homeowners’ Assn. v. Bramalea California, Inc.* (2006) 26 Cal.4th 1, 17, the court held that a mediator’s report showing that one party engaged in bad faith tactics could not be considered even though the misconduct alleged would go unpunished. Similarly, in *Cassel*, after settling a claim in mediation, plaintiff sued his attorneys

alleging a conflict of interest that allegedly induced the plaintiff to settle for less than the case was worth. (*Cassel, supra*, 51 Cal.4th at p. 118.) Despite evidence of purported misconduct, the Supreme Court held that the documents were not discoverable because they were prepared during the course of and for the purpose of the mediation. (*Ibid.*) As a final example, in *Rojas v. Superior Court*. (2004) 33 Cal.4th 407, 416–417, 423, the court precluded the discovery of mediation documents, even though that might foreclose the plaintiff’s lawsuit, as the mediation confidentiality statutes are not subject to a “good cause” exception.

In light of the broad protection afforded under these provisions, the trial court interpreted the term “neutral person” as is used in the mediation privilege statutory provisions of the Evidence Code to mean a third party acting as an intermediary – a “neutral” who does not act as either party’s representative and who is not in a position to decide the dispute. We concur with the definition afforded by the trial court here. The term “neutral person” as stated in section 1115 plainly describes a third party who performs the role of an intermediary to facilitate negotiations between the parties so as to enable them to mutually resolve their dispute.

This nominative form of the term, rather than as an adjective describing the mediator’s impartiality, is a reasonable understanding of the plain meaning of the statute. However, as there is more than one reasonable interpretation of the plain language, the court looked at the legislative history to ensure a construction of the term as intended by the Legislature.

The words “neutral person” and the legislative history behind them do not support the imposition of additional

requirements of impartiality on this process-defined role. Obviously, if the Legislature had intended to impose additional impartiality standards on mediators, they certainly could have done so; they did not.

California enacted a statutory mediation privilege in 1985. That scheme did not include a definition of “mediation” because the Legislature wanted “to allow use of different techniques, without legislative constraints.” (Recommendation: Mediation Confidentiality (Jan. 1997) 26 Cal. Law. Revision Com. Rep. (1996) 407, 413, 416.) In 1993, the Legislature enacted amendments to that statute, including the strengthening of mediation confidentiality by prohibiting the discovery of mediation communications. (*Id.* at pp. 413, fn. 5, 416) As part of that process, the Legislature created a pilot project in Los Angeles County, codified at Code of Civil Procedure section 1775 et seq. In those pilot project provisions, the Legislature rejected an earlier draft using the term “impartial third party,” and imposed instead only the requirement of a “neutral person.” (Assem. Bill No. 3011 (1991–1992 Reg. Sess.) § 3, Assem. Amend., Apr. 2, 1992.)

In 1996, the Law Revision Commission developed amendments to the then-existing mediation statute, which became the current mediation confidentiality statute in 1997. The new amendments, notably, did not further define “neutral person.” In fact, during that process, the Legislature considered, but did not adopt, a provision incorporating a disclosure, conduct and bias requirement in the mediation confidentiality statute. (Assem. Bill No. 939 (1997 Reg. Sess.) Sen. Jud. Com., Aug. 26, 1997.) This conflict-disclosure provision was rejected. That this language was rejected by the Legislature supports the trial

court's conclusion that the statute does not contain an "absence of bias" requirement for "neutral person."<sup>10</sup>

The trial court also noted that this definition of "neutral person" was consistent with the case authority generally proscribing restrictions on the scope of mediation confidentiality. The case upon which Christine principally relies, *Saeta v. Superior Court*, *supra*, 117 Cal.App.4th 261, does not support the argument that the mediation privilege does not apply if a party alleges bias by the mediator. Rather, the *Saeta* court found that an employer's termination review board was not a mediation because the relevant review board acted as a decision-making body. (*Id.* at p. 267.) *Saeta* does not stand for, nor does it even address, the question of whether a lack of neutrality precludes someone from being a mediator.

As correctly defined by the trial court, defendant Weinberg was a neutral person who facilitated the Wolfs' mediation of their

---

<sup>10</sup> The California Rules of Court also make clear that being neutral for the purposes of section 1115 is not the same as being unbiased or free from the appearance of bias. The California Rules of Court that apply to court-appointed mediators define mediator and mediations as requiring a neutral person in the same manner as section 1115. (Cal. Rules of Court, rule 3.858.) However, these rules contain additional provisions related to the disclosure of bias. (*Ibid.*) These additional rules make no sense if the word "neutral" in the mediation context meant "free from the appearance of bias." To hold otherwise would render the anti-bias provisions entirely superfluous. While these rules do not apply in this case (as this was not a court-ordered mediation and because the rule does not affect the scope of the privilege), they provide confirmation that a mediator with a prior relationship with a party can still fall within the meaning of neutral. (See Cal. Rules of Court, rules 3.851, 3.852, 3.850.)

marital dissolution for which mediation confidentiality would apply. As a matter of law, therefore, the motion to compel the production of mediation documents was properly denied.

Moreover, even if “impartiality” were to be interposed as a requirement for a neutral person, the uncontroverted evidence in this record fails to support an inference that Weinberg was not an impartial mediator. A single happenstance meeting while Dick was still married and an expensive watch given well after the conclusion of the engagement were not a sufficient factual basis to support Christine’s inference that Weinberg did not act as an impartial mediator. It was undisputed that Christine and Dick jointly engaged Weinberg to act as an intermediary for settling their divorce litigation, and that he did facilitate communications between the Wolfs in order to assist in a voluntary negotiation of their martial settlement agreement. These undisputed facts support the trial court’s conclusion that Weinberg qualified as a neutral person entitled to the protections of the mediation privilege.<sup>11</sup> Any inference to the contrary would be mere speculation.

---

<sup>11</sup> Philpott was not a mediator. As alleged in Christine’s own pleading, Weinberg, not Philpott, was selected as the mediator. Philpott had a different role – providing the couple’s financial information to Weinberg for Weinberg’s use in the mediation. The undisputed evidence in the record supports the trial court’s finding that Philpott’s role was limited to this and, as such, was a mediation participant, not a mediator. An accountant in possession of the couple’s financial records does not become a “mediator” by providing that information to the mediator. (See Cal. Law Revision Com. coms., Deering’s Ann. Evid. Code (2004 ed.) foll. §§ 1115 & 1121, pp. 387, 392–393.)



Nor does the interest in the protection of confidentiality to facilitate self-determination support the imposition of additional requirements on mediators as argued by Christine in this case. One of the more effective models of active mediation is the participation of the mediator in positing positions, making mediator's proposals or other suggestions that might begin to move the parties away from their initial positions toward a mutually satisfactory conclusion. In fact, section 1121 expressly contemplates that mediators will make reports, evaluations and recommendations and shields those recommendations and reports from discovery. If the mere suggestion of "bias" as a result of even making those suggestions would be enough to open these mediation processes to scrutiny and liability in the future, it might cause mediators to stop using a number of effective mediation techniques – to the detriment of the process and the parties.

3. The Court Did Not Err in Extending Quasi-Judicial Immunity to Defendants Weinberg, Assante Corporation and LWIL.

Having established that Weinberg served as a mediator and facilitated a mediation of the marital dissolution dispute, the defendants sought summary judgment arguing, inter alia, that the mediator and the derivative corporate entities were immune from liability for the claims asserted by Christine. The trial court agreed with that contention and found no triable issues of fact that would exempt Weinberg or his affiliated corporations from immunity. Accordingly, the court granted the immunity summary judgment motion. We find no error in that ruling.

It is well-established that a mediator is entitled to quasi-judicial immunity. (*Howard v. Drapkin, supra*, 222 Cal.App.3d

at pp. 852–953.) Applying the court’s prior correct ruling to the instant motion, Weinberg and his affiliated corporate entities were acting as mediators during a mediation and, therefore, are immune from suit.

Christine’s claims to exceptions to that grant of immunity were unsupported by admissible evidence in the record. Although Christine argued that she was fraudulently induced to enter into the mediation because she was never told of the “financial entanglements” between Dick, Weinberg, and Azra Scagliarini, Christine’s spiritual advisor who originally suggested mediation, she provided no evidence of any misrepresentation of fact made by Weinberg that caused her to participate in the mediation. Christine admitted, in fact, that she had never spoken with or met Weinberg prior to her calling him to discuss a potential mediation. She further admitted that the purpose of this communication was to secure Weinberg as a mediator. Any evidence of a statement or an omission by Weinberg during this premediation stage cannot serve as a basis for civil liability. (See § 1119 [evidence of anything said in a mediation consultation is inadmissible]; see also *Amis v. Greenberg Traurig, supra*, 235 Cal.App.3d at p. 341 [extending the privilege to both acts and omissions].) Nor, as a procedural matter, had Christine pled this theory of liability in her complaint. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 [defendant need only “negate plaintiff’s theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings”].) Finally, the record did not establish a triable issue of fact to support Christine’s alter ego allegation to create a fiduciary duty to disclose owed to her by Weinberg based on Assante’s ownership of

Assante Business Management where Philpott worked. (See *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.* (1993) 19 Cal.App.4th 615, 629 [reversible error to disregard parent/subsidiary corporate form without demonstration of alter ego liability].)

4. The Court Did Not Err in Extending the Litigation Privilege to Defendants.

The defendants also moved for summary judgment claiming that the litigation privilege of Civil Code section 47, subdivision (b) independently barred Christine's action. We agree.

The litigation privilege "applies to any communication (1) made in a judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The gravamen of Christine's action are misleading communications made to her by Weinberg during the mediation as to the value of the couple's community estate, particularly as to the current and future earnings from *Law and Order*. This type of communication is protected by the litigation privilege. (See *Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 499–504 [protecting communications made by jointly selected experts during divorce proceedings]; *Gootee v. Lightner* (1990) 224 Cal.App.3d 587, 589–596 [granting litigation privilege to child custody evaluation used in divorce proceeding].)

None of Christine's claimed exceptions to this absolute privilege find support in the record or in the case law. Christine cites no evidence that the litigation privilege requires a finding of neutrality by the mediator. Nor do the cases suggest that the

privilege is vitiated due to negligence or improper conduct. (See *Ramalingam v. Thompson*, *supra*, 151 Cal.App.4th at pp. 503–504 [alleging that accountant gave negligent and improper financial advice].) Nor do the cases cite an exception to the litigation privilege if there is a fiduciary duty owed, even if one could be established in the facts of this case. In *Ramalingam*, an accountant would have a fiduciary duty to a joint client, yet the privilege was held to apply. (*Id.* at p. 504.) Nor is there admissible evidence in the record to support Christine’s claim of extrinsic fraud or concealment, so as to vitiate the litigation privilege.

5. The Court Did Not Err in Dismissing the Case Under *O’Melveny*.

In *Solin v. O’Melveny & Myers* (2001) 89 Cal.App.4th 451 (*O’Melveny*), the court affirmed the dismissal of a legal malpractice claim because privileged information could not be introduced in defense of the action. In *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, the *O’Melveny* doctrine was further examined and four factors were to be considered “before a court may dismiss a case on the ground that a defendant attorney’s due process right to present a defense would be violated by the defendant’s inability to disclose a client’s confidential information if the action were allowed to proceed.” (*Dietz*, at pp. 792–793.) “First, the evidence at issue must be the client’s confidential information, and the client must be insisting that the information remain confidential.” (*Id.* at p.792.) Second, the confidential information at issue must be highly material to the defendant’s defenses. (*Id.* at pp. 792–793; see also *Reilly v. Greenwald & Hoffman, LLP* (2011) 196 Cal.App.4th 891, 904.) Third, the court must consider whether there are “‘ad hoc

measures from [its] equitable arsenal,’ ” including sealing and protective orders, limiting admissibility of evidence or orders restricting the use of testimony in subsequent proceedings, that might permit the action to proceed. (*Dietz*, at p. 793.) Finally, the court must consider whether it would be fundamentally unfair to allow the action to proceed. (*Ibid.*)

In this case, all four factors were amply established. The defense in this case would necessarily require the disclosure of the communications made during the mediation to rebut Christine’s allegations. Any such communications were privileged and confidential and neither party agreed to waive the privilege. And, these communications were not only material, they were essential, to the defense of the case. There are no “ad hoc” measures that the court could employ to allow this mediation evidence into the record. Finally, it would be fundamentally unfair to allow the case to proceed but preclude defendants from introducing the substance of the mediation in defense. As all four factors set forth in *Dietz* were established in this case, we affirm the trial court’s ruling dismissing this case under the authority of *O’Melveny*.

6. The Court Did Not Err in Granting Summary Judgment on Christine’s Claims.

The final argument in support of defendants’ motion for summary judgment was that Christine could not prove any wrongdoing or causation as to any of her causes of action without relying upon inadmissible mediation evidence, or impermissible inferences about what took place in the mediation. As alleged in the operative complaint, defendants were negligent, fraudulent, and breached their fiduciary duties and contract by failing to value the Wolfs’ marital estate properly during the mediation and

by incorporating those incorrect values into the marital settlement agreement. She further alleges that without having received that false information, she never would have entered into the agreement. Instead, Christine would have either litigated her divorce or obtained a more favorable settlement.

As amply discussed *ante*, evidence capable of supporting Christine's claims is largely rendered inadmissible by mediation confidentiality. To avoid this outcome, Christine argued in opposition that she was fraudulently induced into entering into the mediation by Weinberg's promise that he would provide her with an objective analysis of the couple's financial condition. As discussed *ante*, this allegation is similarly subject to the mediation privilege. Further, a claim of fraudulent inducement was never pled in the complaint and cannot, therefore, form a basis for defeating a motion for summary judgment. Finally, Christine adduced no competent evidence that, but for being fraudulently induced, she would have gone to trial and received a division of Wolf Films larger than the amount received under the MSA. Without a triable issue of fact as to causation, none of Christine's causes of action could survive summary adjudication. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241; *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132–133.) For these reasons, we affirm.<sup>12</sup>

---

<sup>12</sup> We decline to reach defendants' argument in the alternative that the judgment be affirmed on LWIL's statute of limitations defense. The appellate record does not include the nine-page order of August 22, 2015, issued by the court setting out its reasons for its ruling. Without an adequate record, this Court cannot review the basis of the trial court's decision. (See

### DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

JONES, J.\*

We concur:

EDMON, P. J.

LAVIN, J.

---

*Hernandez v. California Hosp. Medical Center* (2000) 78 Cal.App.4th 498, 502.)

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.